Supreme Court, U. S.
FILED
MAY 24 1978
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of The United States

October Term, 1977

No. 77-1675

THE MARION CIRCUIT COURT OF
MARION COUNTY, INDIANA, and
THE HONORABLE J. PATRICK ENDSLEY
as Judge of Said Court,
Petitioners,

v.

STATE OF INDIANA ON THE RELATION
OF THE PUBLIC SERVICE COMMISSION
OF INDIANA;
PUBLIC SERVICE COMPANY OF
INDIANA, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

ROBERT W. GEDDES
HAROLD W. JONES
DAVID A. MALSON

SMITH and JONES
2470 Indiana National Bank
Tower
Indianapolis, Indiana 46204

Counsel for Petitioners

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement Of The Case	3
Summary Of Argument	6
Argument	7
I — The Petitioners Have Standing To Champion The Rights Of The Plaintiffs Below	7
II — The State Supreme Court's Writ Leaves The Plaintiffs Without Access To A Court With Jurisdiction To Try Their Case	8
III — The Supreme Court Of Indiana Intends Its Writ To Be Permanent	9
IV — Deprivation Of Access To An Appropriate Court Is A Denial Of Due Process Of Law	10
V — Protection Of The Due Process Clause Extends To Persons Complaining Of Judicial Deprivation Of Remedies For Breach Of Contract	11
Conclusion	12

TABLE OF AUTHORITIES

Cases:	Page
Angel v. Bullington (1947) 330 U.S. 183	11
Application of Brux, 216 F. Supp. 956, 957 (D. Haw. 1963)	10
Atkins v. United States, 556 F. 2d 1028, 1040 (Ct. Cl. 1977)	10
Boddie v. Connecticut (1971) 401 U.S. 371	11
Brinkerhoff-Faris Trust & Savings Co. v. Hill (1930) 281 U.S. 673, 681	11
Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar (1964) 377 U.S. 1	11
Busick v. Barger (1952) 230 Ind. 198, 102 N.E. 2d 499	9
Craig v. Boren (1976) 429 U.S. 190, 195	8
In re Gumm (1949) 118 Ind. App. 695, 83 N.E. 2d 487	9
Home Bldg. & Loan Assoc. v. Blaisdell (1934) 290 U.S. 398	12
Home Ins. Co. of New York v. Morse (1874) 87 U.S. (20 Wall) 445, 446	11
6 *Ind. Law Encyclopedia*, Contracts, (1958), §§201-06, 251, 262	8
Indiana Telephone Co. v. Indiana Bell Telephone Co. (1976) ____Ind. App.____, 358 N.E. 2d 218	9
Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 436 F. Supp. 432 (D. Nebr. 1976)	10
Lynch v. United States (1934) 292 U.S. 571	12
Mitchell v. W. T. Grant Co. (1974) 415 U.S. 944, 94 S. Ct. 1895	11
Pitts v. Mills (1975) ____Ind. App.____, 333 N.E. 2d 897	9
Poindexter v. Greenhow (1885) 114 U.S. 270	11
Rooker v. Fidelity Trust (1923) 261 U.S. 114	12
Singleton v. Wulff (1976) 428 U.S. 106, 114-16	7
Snyder v. Massachusetts (1934) 291 U.S. 97	11
State ex rel. City of Indianapolis v. Brennan (1952) 231 Ind. 492, 109 N.E. 2d 409	9
State ex rel. Indianapolis Water Co. v. Niblack (1959) 240 Ind. 32, 161 N.E. 2d 377	9
State ex rel. Saylor Development Co. v. Circuit Court of Marion County (1960) 240 Ind. 648, 167 N.E. 2d 470	9
Taylor Drug Stores v. Associated Dry Goods 560 F. 2d 211, 213 (6th Cir. 1977)	10
United States Trust Co. of N.Y. v. New Jersey (1977) 429 U.S. 957, 97 S. Ct. 1505	12
W. B. Worthen Co. v. Kavanaugh (1935) 295 U.S. 56	12
York v. Texas (1890) 137 U.S. 15, 21	11
Statutes:	
Indiana Code 34-4-4-3	9
Other Authorities:	
Constitution of the State of Indiana Article I, Section 12	3
Constitution of the United States Amendment 14, Section I	2
Indiana Constitution Article 7, §1	9
United States Constitution Amendment XIV. §1	12
United States Constitution Article I, §10	12

IN THE

Supreme Court of The United States

October Term, 1977

No. _____

THE MARION CIRCUIT COURT OF
MARION COUNTY, INDIANA, and
THE HONORABLE J. PATRICK ENDSLEY
as Judge of Said Court,
Petitioners,

v.

STATE OF INDIANA ON THE RELATION
OF THE PUBLIC SERVICE COMMISSION
OF INDIANA;
PUBLIC SERVICE COMPANY OF
INDIANA, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The Petitioners the Marion Circuit Court of Marion County, Indiana, and the Honorable J. Patrick Endsley as Judge of said Court, respectfully pray that a Writ of Certiorari issue to review the opinion and decision of the Supreme Court of Indiana entered in this proceeding on December 22, 1977.

OPINION BELOW

The opinion and decision of the Supreme Court of Indiana making permanent its temporary writ prohibiting Petitioner Court from exercising jurisdiction in this case (App. A of Petition) is reported at 370 N. E. 2d 690. The Supreme Court of Indiana denied, without opinion, the Petition of these Petitioners for re-hearing.

JURISDICTION

The opinion and decision of the Supreme Court of Indiana making permanent its temporary writ was entered on December 22, 1977. A timely Petition For Re-Hearing was denied on March 3, 1978. This Petition For Certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTION PRESENTED

Whether the 14th Amendment of the United States Constitution has been violated by the issuance of a permanent writ by the Supreme Court of Indiana which prohibits the petitioning trial court from exercising its original jurisdiction over a contract dispute and which thereby prevents the Plaintiffs below from having their day in court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment 14, Section I which reads

> "... All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 12 of the Constitution of the State of Indiana which reads

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

STATEMENT OF THE CASE

This Petition arises from a Writ Of Prohibition by the Supreme Court of Indiana which in effect prevents the Plaintiffs below from having their day in Court on a claim of breach of contract, abrogation of contract, deception in the inducement of the contract, and violation of constitutional and civil rights.

The Petitioners are an Indiana state trial court of general jurisdiction, and the Judge thereof, before whom the City of Rushville, Indiana, and four of its citizens representing a class of 1500 electric power customers in and near Rushville, have brought a complaint against the Public Service Company of Indiana, Inc., a major electric power utility in the state, and the Public Service Commission of Indiana.

Complaint Summarized

The essence of the Complaint is this. The City of Rushville owned and operated an electric power generating plant and distribution system furnishing

power to its citizens. In May of 1967 it accepted a written offer by the Public Service Company of Indiana, Inc. to buy the Rushville electric power properties for two considerations — a cash payment of $2,000,000.; and a promise to furnish electric power to the Rushville customers at the same rates being charged by Rushville when the contract was closed, so long thereafter as the respective customers continued to occupy the same premises. The Plaintiff class are all who have continued in occupancy.

Both the Federal Power Commission and the Public Service Commission of Indiana approved the contract.

Following those approvals, the contract was closed on May 1, 1968. The cash payment was then made. And the power company then began furnishing power to the Rushville customers at the promised rates being charged by Rushville on that date.

But in 1971 the power company tried, without success before the State Commission, to raise the promised rates.

In 1974 the power company applied to the Public Service Commission again for a general rate increase without excluding its Rushville customers. Later it filed its "supplemental" application with the Commission detailing the proposed rate increases without including its Rushville customers.

Before its 1974 application, the power company had torn down, taken away and destroyed the power plant which it had acquired from Rushville. Subsequently, it also demolished the building which had housed the plant.

On October 6, 1975 the Public Service Commission *sua sponta* ordered a 50% increase in the promised rates for the power company's Rushville customers.

The Complaint charges breach of contract by the power company, abrogation of the contract by the Commission, deception in the inducement of the contract, and violation of constitutional and civil rights.

The Plaintiffs pray for recision and for restoration of the Rushville power properties or their equivalent, or in the alternative, damages, in exchange for the return to the power company of its cash payment.

Subsequent Proceedings

On May 28, 1976 the Public Service Commission of Indiana filed its Motion To Dismiss, and on June 4, 1976 the power company filed its Motion For Summary Judgment, in the Marion Circuit Court. Both Motions claimed that the Marion Circuit Court and the Judge thereof lacked subject matter jurisdiction of the Complaint because the Court of Appeals of Indiana was vested with exclusive jurisdiction over rate case appeals from the Public Service Commission.

(After the Plaintiffs started their lawsuit in the Marion Circuit Court, the City of Rushville had appealed the Commission's *sua sponte* rate order to the Court of Appeals, where it is still pending. That appeal attacks only the Commission's failure to notify the City of its intent to issue the order *sua sponte*.)

The Plaintiffs' brief opposing the two Motions emphasized that Indiana law prohibits the Public Service Commission of Indiana from interpreting contracts, making decisions to enforce contracts, awarding damages for their breach, and ordering recision and restitution. The brief further pointed out that Indiana law does not confer on the Court of Appeals of Indiana any original jurisdiction to order recision or restitution, or to

award damages, for breach of contract. Both Motions by the Defendants were silent on those points of law.

The Marion Circuit Court on April 20, 1977 overruled the power company's Motion For Summary Judgment, and on April 27, 1977 overruled the Commission's Motion To Dismiss. On May 20, 1977 both the power company and the Commission submitted to the Supreme Court of Indiana, their Petition For Writ Of Prohibition against the Marion Circuit Court and the Judge thereof. On June 2, 1977 these Petitioners responded.

After oral argument the Supreme Court of Indiana on June 7, 1977 issued its temporary Writ Of Prohibition stopping the Marion Circuit Court and its Judge from proceeding further, and ordered them to show cause on or before June 17, 1977 why the Writ should not be made permanent. The Marion Circuit Court and its Judge complied.

The Supreme Court of Indiana on December 22, 1977 issued its opinion and decision making the temporary Writ permanent. On March 3, 1978 the Supreme Court of Indiana denied the timely Petition For Re-Hearing And Reconsideration filed by the Marion Circuit Court and its Judge. That Petition had pressed for a clarification of the opinion and decision in respect of their duration and scope.

SUMMARY OF ARGUMENT

The Plaintiffs below have been permanently deprived by the Supreme Court of Indiana of their right to try their case in the petitioning Court of original trial jurisdiction.

The remedy they seek is recision and restitution, or damages, for breach of contract, abrogation of contract,

and deception in the inducement, which are the long established remedies for such cases.

Neither the Public Service Commission nor the Court of Appeals has original jurisdiction over such matters. And neither has the power to grant the redress sought.

The Plaintiffs are thus left with no place to go for their redress. This constitutes a denial of the right of due process of law under the 14th Amendment of the United States Constitution.

ARGUMENT

I

THE PETITIONERS HAVE STANDING TO CHAMPION THE RIGHTS OF THE PLAINTIFFS BELOW

While the due process rights which are the subject of this Petition are not the rights of the Petitioners herein, but rather those of the Plaintiffs in the state court contract action, it is appropriate to allow these Petitioners to assert the rights of those third persons. Although it is ordinarily the rule that a litigant may not assert the rights of third persons, nevertheless, where as here, the third persons whose rights are at stake will be unable to assert their own rights, the grant of standing to one in a position to do so is proper. See, e.g. *Singleton v. Wulff*, 428 U.S. 106 (1976). Even though the Plaintiffs are not technically parties to the original action in the Supreme Court of Indiana, clearly it is their rights which are at stake.

Insofar as the Writ Of Prohibition has ousted Petitioner Court of jurisdiction, and insofar as the Plain-

tiffs below are not formally parties to the prohibition action, they have no forum in which they personally can assert their rights. Moreover, it is significant that the Petitioners herein are seeking relief from an order the effect of which is to impair the enjoyment by the Plaintiffs below of their due process rights. *Craig v. Boren*, 429 U.S. 190, 195 (1976). Clearly the Plaintiffs' rights are "inextricably bound up with the activity the [Petitioner] wishes to pursue." *Singleton v. Wulff*, supra, 428 U.S. at 114-16.

Therefore, the Petitioners here should be granted standing to raise the rights of the City of Rushville and the individuals who appeared as Plaintiffs in the state court action. (It is important to note that the propriety of Petitioners' asserting the rights of these third persons was not contested in the proceedings below.)

II

THE STATE SUPREME COURT'S WRIT LEAVES THE PLAINTIFFS WITHOUT ACCESS TO A COURT WITH JURISDICTION TO TRY CASE

The action filed in the Marion Circuit Court by the City of Rushville and various of its inhabitants was an action on a contract previously concluded between the City and the Public Service Company of Indiana, Inc., one of the Respondents herein. The Plaintiffs in that action sought recision of the contract or, in the alternative, damages for its breach. Both recision and damages are, in the proper circumstances, remedies long recognized in Indiana law. See generally, 6 *Indiana Law Encyclopedia*, Contracts, (1958), §§201-06, 251, 262.

Assuming, as is proper, that the allegations of the complaint in the contract action are true, see, e.g., *Pitts*

v. Mills, ____Ind. App.____, 333 N.E. 2d 897 (1975), it is clear that the Marion Circuit Court as a court of general jurisdiction would ordinarily have subject matter jurisdiction over the action. Ind. Const., Art. 7, §1; I. C. 34-4-4-3; *State ex rel. Saylor Development Co. v. Circuit Court of Marion County*, 240 Ind. 648, 167 N.E. 2d 470 (1960). By contrast, neither the Public Service Commission of Indiana nor the Court of Appeals of Indiana when reviewing orders of the Commission has jurisdiction to construe contracts, adjudicate contract rights, order recision, or award damages for breach of a contract. *Indiana Telephone Co. v. Indiana Bell Telephone Co.*, ____Ind. App.____, 358 N.E. 2d 218 (1976); *State ex rel. Indianapolis Water Co. v. Niblack*, 240 Ind. 32, 161 N.E. 2d 377 (1959); *In re Gumm*, 118 Ind. App. 695, 83 N.E. 2d 487 (1949).

Therefore, insofar as the Indiana Supreme Court's Writ Of Prohibition permanently debars the Plaintiffs in the contract action from proceeding, they are deprived of their day in court to pursue whatever contract remedies may be available to them.

III

THE SUPREME COURT OF INDIANA INTENDS ITS WRIT TO BE PERMANENT

The Writ Of Prohibition directed to the Petitioners herein is a permanent Writ. Neither the Writ itself nor the accompanying opinion by Judge DeBruler indicates that it is to have less than permanent effect. The Writ ousts the Marion Circuit Court of jurisdiction, *State ex rel. City of Indianapolis v. Brennan*, 231 Ind. 492, 109 N.E. 2d 409 (1952), and as a permanent Writ it becomes the law of the case. *Busick v. Barger*, 230 Ind. 198, 102 N.E. 2d 499 (1952). Efforts by the present Petitioners to have the

question of the writ's duration clarified have been unavailing. Therefore, it must be assumed that the effect of this Writ is, in a temporal sense, permanent. The consequences of such permanence is to deprive the City of Rushville and the individual Plaintiffs in the contract action of their day in court to pursue whatever contract remedies may be available to them under Indiana law.

IV

DEPRIVATION OF ACCESS TO AN APPROPRIATE COURT IS A DENIAL OF DUE PROCESS OF LAW

Numerous cases on due process recognize that,

> there is no doubt that it is a deprivation of a person's constitutional right to prevent his access to the Civil Courts. *Application of Brux*, 216 F. Supp. 956, 957 (D. Haw. 1963);

and that,

> it is obvious that access to the courts is a fundamental right of every citizen. . . . *Inmates of Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F. Supp. 432, 436 (D. Nebr. 1976);

and that citizens have,

> a constitutional right of access to enforce a state law which [has] previously been upheld by the highest court of the state. *Taylor Drug Stores v. Associated Dry Goods*, 560 F. 2d 211, 213 (6th Cir. 1977).

Indeed,

> it is a fundamental principle of our jurisprudence that access to the courts to secure and establish important rights should be made available to all citizens at all times. *Atkins v. United States*, 556 F. 2d 1028, 1040 (Ct. Cl. 1977).

Mr. Justice Brandeis acknowledged that "due process in the primary sense" comprehends the "opportunity to present [one's] case and be heard in its support." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 (1930). See also, *Home Ins. Co. of New York v. Morse*, 87 U.S. (20 Wall) 445 (1874). ("Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him." 87 U.S. at 446).

The primary nature of a right to a day in court has been recognized by this Court time and again in a great variety of contexts. See, e.g. *Mitchell v. W. T. Grant Co.*, 415 U.S. 944, 94 S. Ct. 1895 (1974); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). While undoubtedly "the State has full power over remedies and procedures in its own court, and can make any order it pleases in respect thereto," this power will go unchecked only so long as "the substance of right is secured without unreasonable burden to parties and litigant." *York v. Texas*, 137 U.S. 15, 21 (1890). There are constitutional limits upon state power to close the doors of its courts or to regulate procedure therein. *Angel v. Bullington*, 330 U.S. 183 (1947); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

V

PROTECTION OF THE DUE PROCESS CLAUSE EXTENDS TO PERSONS COMPLAINING OF JUDICIAL DEPRIVATION OF REMEDIES FOR BREACH OF CONTRACT

Comparable concern for a state's overreaching its powers can be found in cases invoking the "contracts

clause" of the United States Constitution. U.S. Const. Art I, §10. While the text of the contract clause itself has led to the conclusion that it reaches only legislative and not judicial actions, see, e.g., *Rooker v. Fidelity Trust*, 261 U.S. 114 (1923), the sort of deprivation which that clause forbids to legislatures is properly forbidden to states, in whatever form acting, by the due process clause of the 14th Amendment. U.S. Const. Am. XIV, §1. The sometimes parallel nature of these two clauses has been recognized only recently by this Court. *United States Trust Co. of N.Y. v. New Jersey*, 429 U.S. 957, 97 S. Ct. 1505 (1977). Thus while the contract clause is said to preserve the substance of rights and not particular remedies, the former cannot be destroyed under the guise of a remedial adjustment. See, e.g., *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Lynch v. United States*, 292 U.S. 571 (1934). Cf. *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

CONCLUSION

A more complete bar to the courts than is presented in this case is hard to imagine. The Supreme Court of Indiana has, by its permanent Writ Of Prohibition, not simply adjusted a remedy, but has permanently closed the doors of those state tribunals which alone can grant the type of remedy the Plaintiffs in the contract action seek. This amounts to a deprivation of due process in its most primary sense. Unless this Court recognizes the propriety of allowing these Petitioners to raise the rights of the Plaintiffs below, and grants its Writ to the Supreme Court of Indiana, the Plaintiffs have no further recourse to preserve an opportunity to pursue their rightful remedies.

Respectfully submitted,

ROBERT W. GEDDES
HAROLD W. JONES
DAVID A. MALSON

SMITH AND JONES
2470 Indiana National Bank Tower
Indianapolis, Indiana 46204

Counsel for Petitioners

APPENDIX

INDEX

		Page
I	Opinion and Judgment of the Supreme Court of Indiana	A-1
II	Order Denying Petition For Re-Hearing And For A Reconsideration, Or In The Alternative, For Modification	A-5

ATTORNEYS FOR RELATOR PUBLIC SERVICE COMMISSION OF INDIANA

Theodore L. Sendak, Attorney General
Stephen L. Lucas, Deputy Attorney General
219 State House
Indianapolis, Indiana

ATTORNEYS FOR RELATOR PUBLIC SERVICE COMPANY OF INDIANA, INC.

Alan W. Boyd
Jerry P. Belknap
Greg K. Kamberlin
1313 Merchants Bank Bldg.
Indianapolis, Indiana

OF COUNSEL

Barnes, Hickam, Pantzer & Boyd
1313 Merchants Bank Bldg.
Indianapolis, Indiana

ATTORNEYS FOR RESPONDENTS

David A. Malson
Colonial Building
Courthouse Square
Rushville, Indiana

Harold W. Jones
Robert W. Geddes
2470 Indiana National Bank Tower
Indianapolis, Indiana

IN THE

Supreme Court of Indiana

STATE OF INDIANA On the Relation of PUBLIC SERVICE COMMISSION OF INDIANA, LARRY J. WALLACE, Member and Chairman of the Public Service Commission of Indiana, WILLIAM POWERS and JAMES M. PLASKETT, Members of the Public Service Commission of Indiana, and PUBLIC SERVICE COMPANY OF INDIANA, INC.,	)	NO. 677 S 406
Relators,	)	
v.	)	
MARION CIRCUIT COURT OF MARION COUNTY, INDIANA, and HONORABLE J. PATRICK ENDSLEY, As Judge of said Court,	)	
Respondents.	)	

ORIGINAL ACTION

DeBRULER, J. —

In 1968 the City of Rushville sold its electric utility system including generating facilities to Public Service Company of Indiana, Inc., an electric utility company, for cash and a promise to continue to charge customers served by the city at the 1968 rate level so long as the customer continued to receive service at the same premises. On October 6, 1975, the Public Service Commission of Indiana ordered the Public Service Company of Indiana, Inc., to file for a rate increase for Rushville customers which would increase the rate beyond the 1968 level. A proceeding for review of that order is pending before the Court of Appeals brought there by Rushville. Thereafter, in addition to resisting the order of the Commission by maintaining that review proceeding, Rushville joined by several affected customers instituted a suit against Public Service Company, Inc., and the Public Service Commission of Indiana in the Marion Circuit Court requesting rescission of the contract of sale and damages. The defendants below unsuccessfully sought dismissal of the Marion Circuit Court suit, and petition here for a writ of prohibition against the Marion Circuit Court to prevent its further exercise of jurisdiction in the case. We granted the temporary writ of prohibition.

Relators support their petition by seeking application of the principle of law that the first of two courts acquiring jurisdiction of a subject matter in dispute between the same parties must be deemed to have the exclusive authority in the matter. *State ex rel. International Harvester Co. v. Allen Circuit Court*, (1976) ____Ind. ____, 352 N.E. 2d 487; *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1,*

(1971) 256 Ind. 507, 269 N.E. 2d 869; *State ex rel. Ferger v. Circuit Court*, (1949) 227 Ind. 212, 84 N.E. 2d 585.

The order of the Public Service Commission pending on review in the Court of Appeals is predicated upon a determination of that Commission that the contract provision incorporating the promise to freeze rates does not limit its power to fix the rate at a level inconsistent with that provision. Both the Court of Appeals and the Marion Circuit Court are being called upon in the proceedings pending before them to interpret the same contract provision and to decide whether or not it is enforcible. The resolution of these questions is potentially outcome-determinative in both courts. The subject matter is therefore the same in both proceedings. *State ex rel. American Reclamation and Refining Co., Inc. v. Allen Circuit Court, supra.*

The parties to the contract are parties in both the review proceedings and the civil suit. The Court of Appeals did not obtain formal jurisdiction until after the circuit court case was filed. However, the jurisdiction of the Court of Appeals is derivative of an exercise of authority by the Commission which preceded the institution of the civil suit in time, and upon this basis the jurisdiction of the Court of Appeals should be deemed first acquired for the purposes of this original action. The rule relied on by Relators is fully applicable here and the jurisdiction of the Court of Appeals must be held to be exclusive at this time so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts.

The writ heretofore granted in temporary form is now made permanent.

Givan, C. J., Hunter, Prentice and Pivarnik, JJ., concur.

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Billie R. McCullough, Clerk
217 State House
Indianapolis, 46204
Telephone 633-5200

No. 677S406
State of Indiana et al v. Marion Circuit Court et al

You are hereby notified that the Supreme Court has on this day Respondents' Petition for Rehearing DENIED. Givan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 3rd day of March, 1978

/s/ BILLIE R. McCULLOUGH
Clerk Supreme Court and Court of Appeals

Supreme Court, U. S.
FILED
JUN 22 1978
MICHAEL RODAK, JR., CLERK

No. 77-1675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE MARION CIRCUIT COURT OF MARION COUNTY, INDIANA, and THE HONORABLE J. PATRICK ENDSLEY, AS JUDGE OF SAID COURT,

Petitioners,

vs.

STATE OF INDIANA ON THE RELATION OF THE PUBLIC SERVICE COMMISSION OF INDIANA, PUBLIC SERVICE COMPANY OF INDIANA, INC., ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THEODORE L. SENDAK,
Attorney General
By WILLIAM E. DAILY
Assistant Attorney General
219 State House
Indianapolis, Indiana 46204
Attorney for Respondents The Public Service Commission of Indiana, et al.

GREG K. KIMBERLIN
1000 East Main Street
Plainfield, Indiana 46168

ALAN W. BOYD
JERRY P. BELKNAP
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Attorneys for Respondent Public Service Company of Indiana, Inc.

BARNES, HICKAM, PANTZER & BOYD
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

PAGE

TABLE OF CASES, TEXTBOOKS AND STATUTES CITED i

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 3

ARGUMENT 11

CONCLUSION 17

Table Of Cases, Textbooks And Statutes Cited

Cases

Block v. West Palm Beach (5th Cir.), 112 F.2d 949 16

Ellis v. Dixon, 349 U.S. 458 (1955) 14

Great Lakes Co. v. Huffman, 319 U.S. 293 (1943) 11

Indianapolis Power & Light Co. v. Highland Realty, Inc., 253 Ind. 637, 256 N.E.2d 394 (1970) 8

Pub. Serv. Comm. v. City of Indianapolis (1956), 235 Ind. 70, 131 N.E.2d 308 15

Rooker v. Fidelity Trust, 261 U.S. 114 (1923) 11

State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1 (1971), 256 Ind. 507, 269 N.E.2d 869 ..... 9, 12, 13

State ex rel. Ferger v. Circuit Court (1949), 227 Ind. 212, 84 N.E.2d 585 ..... 9, 12, 13

State ex rel. Indianapolis Water Co. v. Boone Circuit Court, 261 Ind. 583, 307 N.E.2d 870 (1974) 8

State ex rel. Indpls. Ry. v. Superior Court, 225 Ind. 301, 74 N.E.2d 912 (1947) 14

State ex rel. International Harvester Co. v. Allen Circuit Court (1976), ... Ind. ....., 352 N.E.2d 487 .... 9, 12, 13

State ex rel. Public Service Comm. v. Marion Circuit Court, 242 Ind. 145, 177 N.E.2d 397 (1961) 8

Textbooks

Black on Rescission, pages 881, 850 16

Statutes

I. C. 1971, 8-1-3-1 ..... 4, 6

I. C. 1971, 8-1-3-6 15

Other

Rules of Supreme Court of the United States, Rule 23(f) 1, 11

Rules of Appellate Procedure of Supreme Court of Indiana, Rule 4(C) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE MARION CIRCUIT COURT OF MARION COUNTY, INDIANA, and THE HONORABLE J. PATRICK ENDSLEY, AS JUDGE OF SAID COURT,

Petitioners,

vs.

STATE OF INDIANA ON THE RELATION OF THE PUBLIC SERVICE COMMISSION OF INDIANA, PUBLIC SERVICE COMPANY OF INDIANA, INC., ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether the claimed deprivation of a federal constitutional right is properly before this Court when the petition fails to comply with Rule 23(f) of the Rules of this Court.

2. Whether the claimed deprivation of a federal constitutional right was timely and properly raised so as to give this Court jurisdiction to review the judgment of the Supreme Court of Indiana on certiorari when such claim was raised by petitioners for the first time in the Supreme Court of Indiana in their petition for rehearing after that court's decision on the merits and said petition was denied without an opinion.

3. Whether the judgment of the Supreme Court of Indiana sought to be reviewed has the effect of depriving plaintiffs in the Rushville case of any federal constitutional right or merely decides a question of state law.

STATEMENT OF THE CASE

The transaction in which respondent Public Service Company purchased the Rushville electric properties in 1968 is sufficiently described in the petition. In 1974, said respondent filed with respondent Public Service Commission of Indiana a petition for a general increase of its rates. Its proposed new schedules did not include any increase in the rates of the Rushville customers, but provided for continuance of the Rushville optional rates in accordance with the terms of the purchase contract. However, the Commission's order authorizing a rate increase stated, among other things:

> "Within the past ten years Petitioner has purchased certain municipal electric systems. Part of the agreement of purchase in each instance was that each customer receiving electric service from the municipal electric property at the date of the closing of the sale would have the option to elect to receive electric service from Petitioner either at a rate equivalent to the existing municipal rate or at the applicable standard rate of Petitioner so long as he continues to receive service at the same premises, but when service at the municipal rate is once discontinued at the request of the customer, such optional rate will not again be available to such customers or at such premises. These optional rates are on file with the Commission and Petitioner has not proposed to increase such rates. Rushville has objected to any increase. In Petitioner's last rate case the Commission did not order such optional rates increased, although recognizing it had authority to do so. The difference between what these optional rates produced in gross revenues in the test year and what the applicable proposed rates would have produced in the test year if applied to those customers under the optional rates, according to Petitioner's Witness Gimbel, was $250,000."

Finding No. 8 of said order states:

"With regard to Petitioner's agreements with certain municipal electric systems to freeze rates to certain customers, we find that to allow customers under these frozen rates to continue receiving service at rates considerably lower than customers receiving the same type of service is unreasonable and unjustly discriminatory and Petitioner's contract with these municipalities cannot be permitted to extend this unreasonable and unjustly discriminatory treatment in perpetuity. It would be unconscionable for us to permit 2,000 of Petitioner's 484,000 customers to continue to receive electric service at rates that are so low as to be patently unreasonable and unjustly discriminatory. Our Supreme Court has held that it is not possible for a utility by its contracts to take away, deprive or limit this Commission's statutory power to fix rates and charges. *Boone County REMC v. Pub. Serv. Com.*, 239 Ind. 525 (1959); *State ex rel. Pub. Serv. Com. v. Boone Cir. Court*, 236 Ind. 202 (1956); and *Pub. Serv. Com. v. Girton*, 189 Ind. 627 (1920). These optional rates should be withdrawn by Petitioner and the customers served under these optional rates should be served under applicable rate schedules to be filed by Petitioner pursuant to this order."

Rushville took an appeal from the Commission rate order pursuant to the provisions of IC 1971, 8-1-3-1, which provides in substance that any person, firm, association, corporation, etc., adversely affected by any final order of the Public Service Commission of Indiana may appeal to the Court of Appeals of Indiana for errors of law. The appeal is still pending.

Rushville and certain individuals purporting to represent a class of persons entitled to the rates specified in the purchase contract separately filed in the Marion Circuit Court of Marion County an action against the respondents herein in three counts charging, respectively, breach of contract, fraud, and violation of civil rights by abrogation and nullification of their contract rights without due process, taking their property rights without compensation, and impairing the obligation of their contract under color of statutory authority. Each count was expressly based upon the allegation that the order was invalid. The complaint alleged, among other things:

"That action and order by the commission was arbitrary, capricious and unlawful.

"The power company has acted, and will continue acting, to increase the rates of the Plaintiffs herein pursuant to the purported order, using the arbitrary, capricious and unlawful order as a pretext for repudiating its agreement.

* * *

"By reason of the above stated facts, the power company has breached and repudiated, and the commission has abrogated, the power company's agreement to maintain rates as part of its consideration and payment for the Rushville power plant, system and business. * * *"

* * *

"In issuing its sudden order without notice for the increase in the Rushville rates, the commission had full knowledge and fully understood that in so doing it was depriving Rushville of a vital part of the consideration promised it for the sale and transfer of its utility properties and business.

"And the commission also knew and understood that it was affording the power company an opportunity to escape its obligation to Rushville and the other Plaintiffs."

After unsuccessfully challenging jurisdiction of the subject matter in the Marion Circuit Court (Public Service by motion for summary judgment, Commission by motion to dismiss), respondents, as relators therein, instituted the proceeding in the Supreme Court of Indiana for a writ of prohibition resulting in the judgment sought to be reviewed.

Neither a copy of respondents' petition for the writ of prohibition nor a statement of the substance of any part thereof has been included in the petition for certiorari. That petition contains no allegations with respect to the substantive merits of the claim asserted by Rushville, et al., in the Marion Circuit Court, but alleges only that the latter court has no jurisdiction of the subject matter for the following reasons:

1. The foundation of plaintiffs' claim for relief in the Marion Circuit Court as alleged in each count of the complaint is that the rate order of the Public Service Commission was unlawful and invalid. Exclusive jurisdiction to pass on and determine the validity of an order of the Public Service Commission is lodged in the Court of Appeals of Indiana by IC 1971, 8-1-3-1, and Rule 4(C) of the Rules of Appellate Procedure of the Supreme Court of Indiana. Said Rule provides, in part: "The Court of Appeals shall have jurisdiction to * * * review final decisions of * * * the Public Service Commission of Indiana * * * as provided by statute for the Appellate Court and Court of Appeals."

2. Since an appeal from said order is pending in the Court of Appeals of Indiana, the possibility of conflicting determinations with respect to the validity of the order might arise if both the Court of Appeals and the Marion Circuit Court were permitted to proceed.

As the petition for certiorari indicates (p. 6), the petitioners herein filed in the proceeding in the Supreme Court of Indiana:

(1) a response to the petition prior to the granting of the temporary writ;

(2) a return to the order to show cause why the temporary writ should not be made permanent; and

(3) a petition for rehearing after the writ was made permanent.

Their petition here is silent as to the contents of either their response or their return. With respect to the petition it asserts merely (p. 6):

> "That Petition had pressed for a clarification of the opinion and decision in respect of their duration and scope."

Neither petitioners' response prior to the issuance of the temporary writ, nor their return to the order to show cause why said writ should not be made permanent asserted any claim of violation of any federal right, constitutional or otherwise. Their petition for rehearing included the following:

> "The opinion employs language that creates uncertainty—
>
> "'. . . The rule relied on by Relators is fully applicable here and the jurisdiction of the Court of Appeals must be held to be exclusive *at this time* so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts.' [Emphasis added] (Opinion page 3, lines 2-6)
>
> when placed alongside the words of the decision itself—
>
> "'The writ heretofore granted in temporary form *is now made permanent.*' [Emphasis added] (Opinion page 3, line 7)
>
> * * *
>
> "If the language quoted next above imports only a halt in the proceedings before the Respondents during the pendency of the litigation in the Court of Appeals, then the opinion and decision should be modified so that the Plaintiffs in the litigation before the Respondents may preserve testimony and other evidence by way of deposition. Testimony of key witnesses will be lost unless it is perpetuated.
>
> "If the language of the decision, standing alone, should be construed as the final and immutable ruling of the Supreme Court, then it deprives the Plaintiffs of their lawful remedies. It bars them

from their day in Court. It withholds their rightful redress. It denies them the due process of law guaranteed by Article I, Section 12 of the Constitution of the State of Indiana and the 14th Amendment of the Constitution of the United States. It prohibits these Respondents from honoring those fundamental rights.

"If the quoted decision is not intended to run beyond the pendency of the Court of Appeals Cause No. 2-1275A-360, then the opinion and decision should be modified to state with unquestionable certainty whether the Plaintiffs are thus barred and their constitutional rights struck down or instead, are but temporarily halted in their proceedings in the forum of these Respondents."

The foregoing statements in the petition for rehearing constitute the first and only attempt of petitioners to assert the existence of any federal question in the Supreme Court of Indiana. No copy of the order denying the rehearing appears either in the body of the petition or the appendix thereto. The appendix includes a copy of a notice to petitioners from the Clerk of the Supreme Court of Indiana that their rehearing petition had been denied, and contains no reference to any accompanying opinion. There was, in fact, no such opinion.

The Supreme Court of Indiana has repeatedly held that the jurisdiction of the Indiana Court of Appeals to review and determine the validity of Commission orders is exclusive and that no circuit or superior court has such jurisdiction even when the appeal remedy has not been pursued.

State ex rel. Indianapolis Water Co. v. Boone Circuit Court, 261 Ind. 583, 307 N.E.2d 870. (1974).

Indianapolis Power & Light Co. v. Highland Realty, Inc., 253 Ind. 637, 256 N.E.2d 394 (1970).

State ex rel. Pub. Serv. Comm. v. Marion Circuit Court, 242 Ind. 145, 177 N.E.2d 397 (1961).

However, its decision with respect to issuance of the writ of prohibition involved here was based entirely on the second ground urged by respondents in the petition. The Indiana court stated (Pet. App., pp. A-2 and A-4):

"Relators support their petition by seeking application of the principle of law that the first of two courts acquiring jurisdiction of a subject matter in dispute between the same parties must be deemed to have the exclusive authority in the matter. *State ex rel. International Harvester Co. v. Allen Circuit Court*, (1976) ..... Ind. ....., 352 N.E.2d 487; *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1*, (1971) 256 Ind. 507, 269 N.E.2d 869; *State ex rel. Ferger v. Circuit Court*, (1949) 227 Ind. 212, 84 N.E.2d 585.

* * *

"The rule relied on by Relators is fully applicable here and the jurisdiction of the Court of Appeals must be held to be exclusive at this time so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts."

The petition for certiorari states (pp. 9, 10):

"Efforts by the present Petitioners to have the question of the Writ's duration clarified have been unavailing. Therefore, it must be assumed that the effect of this Writ is, in a temporal sense, permanent. The consequences of such permanence is to deprive the City of Rushville and the individual Plaintiffs in the contract action of their day in court to pursue whatever contract remedies may be available to them under Indiana law."

The "Efforts" referred to necessarily refer only to petitioners' assertion in their petition for rehearing that the language in the opinion of the Supreme Court of Indiana is conflicting and should be clarified "to state with unquestionable certainty whether the Plaintiffs are

thus barred and their constitutional rights struck down or instead, are but temporarily halted in their proceedings in the forum of these Respondents (present petitioners)."

The sole basis of petitioners' claim of denial of their constitutional rights, therefore, is the inference they insist must be drawn from the denial of their petition for rehearing without modification of the language which they claim created uncertainty, that regardless of the outcome of the proceeding pending in the Court of Appeals of Indiana, the Rushville plaintiffs are concluded as to all substantive merits of their claim by the judgment sought to be reviewed. As shown in the argument which follows there is no sound basis for an inference that the Supreme Court of Indiana either intended to, or did in fact, decide anything but an issue of state law.

ARGUMENT

The petition for certiorari contains nothing whatever with respect to the stage in the proceedings in which the federal question sought to be reviewed was raised, or the manner in which it was raised, as required by Rule 23(f) of the Rules of this Court. In fact, the first and only such claim by petitioners in the Supreme Court of Indiana was made in their petition for rehearing. That claim was, in effect, that a violation of a constitutional right would result unless the Supreme Court of Indiana modified or clarified the statement in its opinion "The writ heretofore granted in temporary form is now made permanent." Since the petition for rehearing was denied without opinion their effort to raise a federal question thereby, constitutional or otherwise, comes too late. *Rooker v. Fidelity Trust*, 261 U.S. 114, 117 (1923). It can scarcely be claimed that the statement in the opinion that the writ previously granted in temporary form was made permanent came as a surprise to petitioners here since the record shows that they were served with copies of the order which not only granted the temporary writ pending the further order of the court, but ordered petitioners to show cause why said writ should not be made permanent. Petitioners thus had a clear opportunity to assert in their return to said order to show cause that an order making said writ permanent would violate a federal right of petitioners.

There is no substantial basis for such claim in any event. In *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943), this Court said:

> "The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings, and conclusions of law."

The construction of the judgment that petitioners here seek to attribute to the Supreme Court of Indiana gives no effect whatever to the statement of that court:

> "* * * the jurisdiction of the Court of Appeals must be held to be exclusive at this time so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts."

There is other language in the opinion which clearly established that petitioners are in error in their contention as to the effect of the court's statement that the temporary writ should be made permanent. The Supreme Court of Indiana also stated (Pet. App., pp. A-3 and A-4):

> "Relators support their petition by seeking application of the principle of law that the first of two courts acquiring jurisdiction of a subject matter in dispute between the same parties must be deemed to have the exclusive authority in the matter. * * *
>
> * * *
>
> "* * * The rule relied on by Relators is fully applicable here . . . ."

In support of the statement of the principle so held applicable, the opinion cites:

> *State ex rel. International Harvester Co. v. Allen Circuit Court* (1976), ... Ind. ....., 352 N.E.2d 487.
>
> *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1*, (1971), 256 Ind. 507, 269 N.E.2d 869.
>
> *State ex rel. Ferger v. Circuit Court* (1949), 227 Ind. 212, 84 N.E.2d 585.

In *State ex rel. International Harvester Co. v. Allen Circuit Court, supra*, the court said:

> "An unseemly conflict of jurisdiction exists between two courts of coordinate jurisdiction where both

> exert authority over cases between the same parties and involving the same subject matter and issues. * * * In such instances the jurisdiction of the court first acquiring such jurisdiction is deemed exclusive *until the case is finally disposed of on appeal or otherwise.*" (Page 489) (Emphasis added.)

Consequently, it is an inherent part of the rule which the Supreme Court of Indiana stated to be fully applicable in the proceeding sought to be reviewed here that the exclusive jurisdiction of the first acquiring court continues only until the case pending therein is fully disposed of on appeal or otherwise. That the Indiana court has never regarded the issuance of a final order that a temporary writ be made permanent as conflicting with the above principle is clear from *State ex rel. Ferger v. Circuit Court*, 227 Ind. 212, 84 N.E.2d 585 (1949), cited both in *State ex rel. International Harvester Co. v. Allen Circuit Court, supra*, and in the opinion involved here as stating the principle applicable. In the *Ferger* case the Supreme Court of Indiana stated (227 Ind. at p. 215):

> "* * * the court first having jurisdiction of the subject matter and the parties * * * has exclusive jurisdiction until the case in that court is finally disposed of on appeal or otherwise."

It also stated (pp. 214 and 217):

> "A temporary writ of prohibition has been heretofore issued.
>
> * * *
>
> "The temporary writ of prohibition heretofore granted is now by this court made permanent."

In *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1*, 256 Ind. 507, 269 N.E.2d 869 (1971), also cited both in the *International Harvester* case and the opinion in this case supporting the principle that the jurisdiction of the

court first acquiring jurisdiction is deemed to be exclusive until the case is finally disposed of on appeal or otherwise, the opinion shows (256 Ind. at p. 508) that the Supreme Court originally issued a temporary writ and thereafter ordered it made permanent.

It is clear from the above cases that the Supreme Court of Indiana has never considered that an order making permanent a temporary writ of prohibition against continued exercise of jurisdiction of the second acquiring court conflicts with the rule that the jurisdiction of a first acquiring court is exclusive until the case pending therein is finally disposed of on appeal or otherwise. Consequently, the only reasonable inference to be drawn from the failure of the Supreme Court of Indiana to modify its opinion on rehearing as demanded by petitioners herein is that it did not agree with their contention that its opinion was ambiguous and, therefore, saw no need for clarification. Cf. *Ellis v. Dixon*, 349 U.S. 458 at p. 462 (1955).

The principle held applicable by the Supreme Court of Indiana and its applicability to this case, including the determination as to which of the two courts first acquired jurisdiction, are, of course, purely matters of state law as to which the decision of said court is conclusive. However, an analysis of the basis for the issuance of the writ in this case and the practical effect of the termination of the appeal pending in the Court of Appeals fortify the obvious conclusion that petitioners have been deprived of no federal right of any character. It is clear that if both courts had been permitted to proceed, the possibility of conflicting orders in the two courts would have existed since both involve the validity of the Commission order. Under Indiana law even the possibility of such a conflict is a sufficient basis for the issuance of the writ. *State ex rel. Indpls. Ry. v. Superior Court*, 225 Ind. 301, 74 N.E.2d 912 (1947).

The validity of the Commission order is necessarily involved in said appeal and will finally be determined in that proceeding. If it should finally be held invalid by the Indiana Court of Appeals or the Supreme Court of Indiana on transfer, respondent utility would be obligated to refund to its customers, including the Rushville customers, the difference between the former rates and the higher rates collected in the interim to the extent not sustained on the appeal. IC 1971, 8-1-3-6.

In *Pub. Serv. Comm. v. City of Indianapolis* (1956), 235 Ind. 70, 131 N.E.2d 308, the court said:

> "It is established law in this state that there is an inherent right to appeal to the courts for relief against the violations of personal or property rights as a result of administrative action. The legislature may not absolutely deprive one of such relief or judicial review. However, where the statute provides for a procedure for such review or for a judicial remedy, it excludes any common law or equitable procedure to the extent such statutory provisions are adequate in protecting and preserving such substantive rights guaranteed by the constitution, the statutes or general principles of law." (235 Ind. 83, 131 N.E.2d 313.)

Since the City of Rushville, as such, has sustained no damage by reason of the order, and its users would receive a refund of the increase collected to the extent not sustained on the rate order appeal, it would appear that in that event the statutory remedy would afford complete relief and exclude any other remedy in the Marion Circuit Court or elsewhere, not because of the order making the writ permanent, but because of the principle that the statutory provision for review excludes any common law or equitable procedure to the extent its provisions are adequate in protecting and preserving the substantive rights guaranteed by the Constitution, the statutes or general principles of law.

Even assuming that a technical breach of the contract could be claimed because the Rushville users would have been required to pay the higher rates even though the amounts are refunded, it does not follow that the contract could be rescinded, since neither Rushville nor its ratepayers would have sustained any loss. *Block v. West Palm Beach* (5th Cir.), 112 F.2d 949, 952, citing *Black on Rescission*, pages 881 and 850.

As to the claim of petitioners that there are issues in the Circuit Court proceeding not involved in the rate order appeal, there is no basis upon any reasonable interpretation of the order making the temporary writ of prohibition permanent for petitioners' contention that it bars Rushville or the plaintiffs from asserting any issue they desire to litigate in the Marion Circuit Court whenever the cause pending in the Court of Appeals is finally terminated, subject to the legal limitation that the parties will be bound as to all matters adjudicated in the proceeding in the Court of Appeals.

Petitioners' basic error lies in their assumption that their petition for rehearing required the Supreme Court of Indiana either to modify its opinion, or assent by implication to petitioners' charge that the effect of the writ is to deprive the City of Rushville and the individual plaintiffs in the Marion Circuit Court of their day in court. The proceeding for the writ of prohibition involved no such issue either by any allegation of the petition therefore or any statement in any brief filed by these respondents in the Supreme Court of Indiana. By asserting violation of a federal right petitioners are, in effect, attempting to lift themselves by their bootstraps by asserting an interpretation of the judgment which is not only unsupported by the opinion of the Supreme Court of Indiana but in complete conflict with the intention clearly shown by its opinion language as well as by other decisions of that court cited in its opinion.

CONCLUSION

The petition for certiorari presents no federal question. Even if assumed to be sufficient for that purpose, the undisputed record shows that no claim of a federal question was ever timely made. In any event, there is no basis for petitioners' claim that the judgment making the writ permanent either deprives them of due process of law or violates any federal right they possess.

The petition for certiorari should be denied.

Respectfully submitted,

THEODORE L. SENDAK,
Attorney General
By WILLIAM E. DAILY
Assistant Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-5512

Attorney for Respondents
The Public Service Commission
of Indiana, et al.

GREG K. KIMBERLIN
1000 East Main Street
Plainfield, Indiana 46168
Telephone: (317) 839-9611

ALAN W. BOYD
JERRY P. BELKNAP
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: (317) 638-1313

Attorneys for Respondent
Public Service Company
of Indiana, Inc.

BARNES, HICKAM, PANTZER & BOYD
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: (317) 638-1313
Of Counsel